

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DENNIS J. ROBINSON,

Plaintiff,

V.

NANCY A. BERRYHILL, Acting  
Commissioner of the Social Security  
Administration.

Defendant.

CASE NO. 3:16-cv-06002 JRC

## ORDER ON PLAINTIFF'S COMPLAINT

NANCY A. BERRYHILL, Acting  
Commissioner of the Social Security  
Administration.

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States Magistrate Judge, Dkt. 6). This matter has been fully briefed. *See* Dkt. 13, 17, 18.

The ALJ found that plaintiff is disabled when his substance use disorders are considered. AR. 20. However, the ALJ also found that plaintiff “would not be disabled if

1 he stopped the substance use,” and hence, plaintiff is not “disabled within the meaning of  
2 the Social Security Act.” AR. 26.

3 The Social Security Act prohibits the award of disability benefits when drug  
4 addiction and/or alcoholism is a contributing factor material to the determination of  
5 disability. *See* 42 U.S.C. §§ 423 (d)(2)(C), 1382c(a)(3)(J); *Sousa v. Callahan*, 143 F.3d  
6 1240, 1245 (9th Cir. 1998).

7 After considering and reviewing the record, although the ALJ used the correct  
8 standard when reviewing plaintiff’s claimed disability, the ALJ erred by failing to discuss  
9 the significant, probative evidence provided by a reviewing doctor. The reviewing doctor,  
10 Dr. Phyllis N. Sanchez, Ph.D., issued opinions directly relevant to the important findings  
11 providing the basis for the ALJ’s ultimate decision regarding disability in this matter,  
12 including whether plaintiff would be disabled if he stopped the substance use.

14 Therefore, this matter is reversed and remanded pursuant to sentence four of 42  
15 U.S.C. § 405(g) to the Acting Commissioner for further consideration consistent with this  
16 order.

17 BACKGROUND

18 Plaintiff, DENNIS J. ROBINSON, was born in 1985 and was 27 years old on the  
19 alleged date of disability onset of March 21, 2013. *See* AR. 211-17, 218-24. Plaintiff  
20 completed high school. AR. 52. Plaintiff has some work history as a food warehouse  
21 stocker, in telecommunications and in customer service. AR. 279-90. He was let go from  
22 his last job for tardiness. AR. 42-43

According to the ALJ, plaintiff has at least the severe impairments of “schizoaffective disorder, bipolar affective disorder, poly substance abuse and antisocial personality disorder (20 CFR 404.1520(c) and 416.920(c)).” AR. 15

At the time of the hearing, plaintiff was living in a house with his grandmother, aunt and cousin. AR. 38.

## PROCEDURAL HISTORY

Plaintiff's applications for disability insurance benefits ("DIB") pursuant to 42 U.S.C. § 423 (Title II) and Supplemental Security Income ("SSI") benefits pursuant to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and following reconsideration. *See* AR. 90, 91, 112, 113. Plaintiff's requested hearing was held before Administrative Law Judge Robert P. Kingsley ("the ALJ") on November 26, 2014. *See* AR. 32-66. On May 21, 2015, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 9-31.

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether the ALJ properly evaluated the medical evidence; (2) Whether the ALJ properly evaluated plaintiff's testimony; (3) Whether the ALJ properly evaluated the lay evidence; (4) Whether the ALJ properly assessed plaintiff's residual functional capacity ("RFC") in the absence of substance abuse ("DAA") and erred by basing the step four and five findings on his erroneous RFC assessment; and (5) Whether the ALJ erred by improperly concluding that plaintiff's DAA was a factor material to his disability. *See* Dkt. 13, p. 2.

## **STANDARD OF REVIEW**

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

## DISCUSSION

(1) Whether or not the ALJ properly evaluated the medical evidence.

Plaintiff argues that the “ALJ erred by failing to discuss Dr. Sanchez’s June 2013 opinion that substance abuse did not contribute significantly to [plaintiff]’s functional impairments, and that the effects of [] impairments on his work activities were not due primarily to alcohol or drug abuse/addiction.” Dkt. 13, p. 6 (citing AR. 353, 355).

Plaintiff contends that this opinion “is significant, probative evidence that the ALJ could not simply disregard without explanation.” *Id.* (footnote omitted). Defendant concedes that the “ALJ did err in not addressing this opinion, but given the different standard used in making this assessment, this error should be considered harmless.” Dkt. 17, p. 6.

The Commissioner “may not reject ‘significant probative evidence’ without explanation.” *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981))). The “ALJ’s written decision must state reasons for disregarding [such] evidence.” *Flores, supra*, 49 F.3d at 571. For example, “an ALJ cannot in its decision totally ignore a treating doctor and his or her notes, without even mentioning

1 them.” *Marsh v. Colvin*, 792 F.3d 1170, 1172-73 (9th Cir. 2015) (citing *Garrison v.*  
2 *Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014)).

3 Dr. Phyllis N. Sanchez, Ph.D., did not examine plaintiff, but reviewed some of the  
4 medical evidence on June 4, 2013, including medical reports dated January 22, 2010;  
5 February 2, 2011; March 7, 2013; and May 21, 2013. *See AR. 353-56*. She opined that  
6 plaintiff suffered from many marked limitations. *See AR. 355*. Dr. Sanchez also opined  
7 that the limitations on plaintiff’s ability to perform work were not primarily due to  
8 alcohol or drug abuse/addiction. *See AR. 356*.

9 The Court agrees with defendant’s concession that the ALJ erred by failing to  
10 discuss the opinions of Dr. Sanchez, because her opinion clearly is significant, probative  
11 evidence. *See Flores, supra*, 49 F.3d at 571. Therefore, the next question to be decided is  
12 whether or not this error is harmless.

13 The Ninth Circuit has concluded that it is not harmless error for the ALJ to fail to  
14 discuss a medical opinion. *Hill v. Astrue*, 698 F.3d 1153, 1160 (9th Cir. 2012) (“the  
15 ALJ’s disregard for Dr. Johnson’s medical opinion was not harmless error and Dr.  
16 Johnson’s opinion should have been considered”) (citing 20 C.F.R. § 404.1527(c) (noting  
17 that this Ruling requires the evaluation of “every medical opinion” received)).

18 The ALJ’s opinion differs from Dr. Sanchez’ opinion regarding whether or not  
19 plaintiff’s substance abuse is a material factor contributing to plaintiff’s disability. The  
20 ALJ found, at the initial steps in the evaluation process, that a “finding of ‘disability’ is []  
21 appropriate” in this case when limitations from plaintiff’s substance use disorders are  
22 considered. *See AR. 20*. Therefore, the question becomes “would the other impairments  
23  
24

1 [other than substance abuse] improve to the point of non-disability in the absence of the  
2 drug or alcohol abuse." AR. 17 (citing SSR 12 – 2P).

3 In determining whether or not a claimant's alcoholism or drug addiction is material  
4 pursuant to 42 U.S.C. § 423(d)(2)(C), the test is whether or not "an individual would still  
5 be found disabled if []he stopped using alcohol or drugs." *Sousa v. Callahan*, 143 F.3d  
6 1240, 1245 (9th Cir. 1998) (quoting 20 C.F.R. § 404.1535(b)(1)).

7 Here, Dr. Sanchez opined that the limitations on plaintiff's ability to perform work  
8 were not primarily due to alcohol or drug abuse/addiction. *See* AR. 356. A logical  
9 inference from this opinion is that in the absence of drug and alcohol abuse, plaintiff still  
10 would suffer close to the same amount of limitations on his ability to work. *See id.*

12 Therefore, Court concludes that the opinion from Dr. Sanchez is contrary to and very  
13 relevant to one of the most important findings by the ALJ, that is, that plaintiff "would  
14 not be disabled if he stopped the substance use (20 C.F.R. §§ 404.1520(f), 404.1535,  
15 416.920(f) and 416.935)." *See* AR. 26. Therefore, the Court cannot conclude with  
16 confidence that no ALJ when fully crediting the opinion from Dr. Sanchez "could have  
17 reached a different disability determination." *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th  
18 Cir. 2015) (quoting *Stout*, 454 F.3d at 1055-56).

19 The Ninth Circuit has reaffirmed the explanation in *Stout* that "ALJ errors in  
20 social security are harmless if they are 'inconsequential to the ultimate nondisability  
21 determination' and that 'a reviewing court cannot consider [an] error harmless unless it  
22 can confidently conclude that no reasonable ALJ, when fully crediting the testimony,  
23

1 could have reached a different disability determination.”” *Marsh*, 792 F.3d at 1173  
2 (quoting *Stout*, 454 F.3d at 1055-56).

3 Therefore, the Court concludes that it was not harmless error for the ALJ to fail to  
4 discuss the medical opinion from Dr. Sanchez. *See id.* Although plaintiff requests a  
5 remand with a direction to award benefits, the Court concludes based on the record as a  
6 whole, that further administrative proceedings would be useful in this case. *See Treichler*  
7 *v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014) (citations  
8 omitted) (remand for benefits is not appropriate when further administrative proceedings  
9 would serve a useful purpose). The ALJ should evaluate the medical opinion of Dr.  
10 Sanchez in the first instance, and should have the opportunity to evaluate the new  
11 evidence plaintiff submitted to the Appeals Council. *See id.*; *see also* Dkt. 13, pp 8-11.  
12 Therefore, this matter is reversed and remanded to the administration for further  
13 administrative proceedings consistent with this opinion.

15 (2) **Whether or not the ALJ properly evaluated plaintiff’s testimony.**

16 The Court already has concluded that the ALJ erred in reviewing the medical  
17 evidence and that this matter should be reversed and remanded for further consideration,  
18 *see supra*, section 1. In addition, the evaluation of a claimant’s statements regarding  
19 limitations relies in part on the assessment of the medical evidence, some of which the  
20 ALJ did not have the opportunity to review. *See* 20 C.F.R. § 404.1529(c); SSR 16-3p,  
21 2016 SSR LEXIS 4. Therefore, for this reason, plaintiff’s testimony and statements  
22 should be assessed anew following remand of this matter.

(3) Whether or not the ALJ properly evaluated the lay evidence and the RFC in the absence of substance abuse (“DAA”), and erred by basing the step four and five findings on his erroneous RFC assessment.

Similarly, the lay evidence and the RFC in the absence of substance abuse should be evaluated anew following remand of this matter. As a consequence, the steps four and five findings based on the RFC in the absence of substance abuse (“DAA”) should be evaluated anew following remand of this matter, as should the issue of the materiality of plaintiff’s DAA to his disability.

## CONCLUSION

Based on the stated reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration consistent with this order.

**JUDGMENT** should be for plaintiff and the case should be closed.

Dated this 21st day of November, 2017.

  
J. Richard Creatura  
United States Magistrate Judge